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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE W. McGOVERT; CYNTHIA M. WRIGHT, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant - Appellee.	No. 04-16609 D.C. No. CV-03-02540-MJJ MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted June 14, 2006
San Francisco, California

Before: RYMER and T.G. NELSON, Circuit Judges, and KING,[**] District Judge.

Bruce W. McGovert and Cynthia M. Wright (collectively, "McGovert") appeal the district court's order dismissing their Federal Tort Claims Act (FTCA) suit for lack of subject matter jurisdiction. We have jurisdiction under 28 U.S.C.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

§ 1291, and we affirm.

"The court reviews de novo subject matter jurisdiction determinations under the FTCA." Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005) (citation omitted).

If a federal employee is not within the scope of employment, there is no subject matter jurisdiction under the FTCA. See, e.g., Clamor v. United States, 240 F.3d 1215, 1217 (9th Cir. 2001). For a military member like Coast Guardsman Bikram S. Ghuman, acting "within the scope of his office or employment" means "in line of duty." 28 U.S.C. § 2671. "The scope of employment inquiry, including, in the military context, whether the employee was 'acting in line of duty' is defined by the applicable state law of respondeat superior." Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1163 (9th Cir. 2005) (quoting Lutz v. Sec'y of the Air Force, 944 F.2d 1477, 1488 (9th Cir. 1991)). "In this case, because the allegedly negligent act took place in California, California law provides the controlling law." Id. (citations omitted).

California follows the general "going and coming" rule. See, e.g., Ducey v. Argo Sales Co., 602 P.2d 755, 763 (Cal. 1979). "Under the so-called 'going and coming rule' an employee is not regarded as acting within the scope of his employment while going to or coming from his place of work." Id. (citations

omitted). McGovert contends that exceptions to the general "going and coming" rule apply. We disagree.

For purposes of our analysis, we construe factual disputes in McGovert's favor and assume -- as did the district court -- that (1) Ghuman was returning to his military-provided housing in Petaluma and (2) the Coast Guard therefore saved over $900 in monthly housing allowance.[1] Nevertheless, the Coast Guard did not receive an "incidental benefit" from Ghuman's commute. See, e.g., Hinman v. Westinghouse Elec. Co., 471 P.2d 988, 991-92 (Cal. 1970) (applying "incidental benefit" exception to the "going and coming" rule). In contrast to cases such as Hinman and Huntsinger v. Fell, 99 Cal. Rptr. 666, 670-71 (Cal. App. 1972), there is no nexus here between the commuting and the presumed benefit of Ghuman's residence in Petaluma. Ghuman's work day had ended. The Coast Guard did not require him to furnish a vehicle for his job. Travel in his vehicle was not part of his duties. He was neither paid for the commute nor reimbursed for commuting expenses. The Coast Guard was "not involved" with how he got to work. He would commute even if the government did not benefit, i.e., even if it had to pay

[1] Because we affirm applying summary judgment standards, we need not decide whether the district court could have weighed the evidence under Fed. R. Civ. P. 12(b)(1) in making its determination. See, e.g., Autery, 424 F.3d at 956 (reiterating rule that, if the jurisdictional issue and substantive claims are not "intertwined," then the court may weigh evidence under Rule 12(b)(1)).

him a housing allowance. Because there was no such nexus, the "incidental benefit" exception does not apply. See, e.g., Anderson v. Pac. Gas & Elec. Co., 17 Cal. Rptr. 2d 534, 539 (Cal. App. 1993); Caldwell v. A.R.B., Inc., 222 Cal. Rptr. 494, 503-04 (Cal. App. 1986); Munyon v. Ole's, Inc., 186 Cal. Rptr. 424, 428-29 (Cal. App. 1982); Harris v. Oro-Dam Constructors, 75 Cal. Rptr. 544, 548 (Cal. App. 1969); cf. Hinojosa v. Workmen's Comp. Appeals Bd., 501 P.2d 1176, 1178 (Cal. 1972).

This result is consistent with Ninth Circuit case law applying California law in similar FTCA situations involving military members, or with military employees in other jurisdictions. See, e.g., Liberatore, 408 F.3d at 1163-64 (finding, under California law, that Navy member was not in scope of employment while driving during temporary duty but while on leave and not furthering his employer's purpose) (citing cases); Clamor, 240 F.3d at 1217 ("The United States derived no benefit from [employee's] activities once he stopped working on the U.S.S. Los Angeles and left for the day, any more than it does when any other employee departs for the evening.") (Hawaii law); Hartzell v. United States, 786 F.2d 964, 967-69 (9th Cir. 1986) (holding Air Force member not in scope of employment while driving, even if travel to duty station was in some part intended to serve the Air Force) (Arizona law); Davies v. United States, 542 F.2d 1361, 1364 (9th Cir.

1976) (finding military officer not in scope of employment while driving to base to retrieve a document to work at home; no exception to general rule that commuting to or from work is outside scope of employment) (Washington law).

The "bunkhouse" exception also does not apply. The exception is generally a worker's compensation rule. The (limited) authority discussing the bunkhouse rule in a respondeat superior context is distinguishable. Tarasco v. Moyers, 185 P.2d 86 (Cal. App. 1947) does not apply because the employee, in addition to going home, was also performing part of his employment duties. See Gurklies v. General Air Conditioning Corp., 205 P.2d 749, 751-52 (Cal. App. 1949).

Here, on the other hand, Ghuman was not performing any function for the Coast Guard. He was not returning to a workplace. He was not -- as in Tarasco -- required to return equipment to Petaluma as part of his duties. The Coast Guard gave him no gasoline for the trip. He was not driving to or from an off-base work location. Ghuman was presumably commuting back home. The commute was for his benefit, not the Coast Guard's. The commute does not fit the "bunkhouse" exception. Rather, it fits squarely within the "going and coming" rule.

AFFIRMED.